United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

United States Court of Appeals

FOR THE SECOND CIRCUIT

74-2344

SIDNEY N. ROSENTHAL,

Plaintiff-Appellant,

vs.

EMANUEL, DEETJEN & CO., HEINZ BIEL, JOHN R. McDONNELL, PEYTON KNIGHT, JEAN-FRANCOIS DeCHARRIERE, WILLIAM G. FALLON, ROBERT P. MAHUSKE, PETER McGEE, JOSEPH TARANGELO, ESTATE OF ANDREW WILLIAMS, ESTATE OF JOHN P. FAGEN, ESTATE OF RUDOLPH DEETJEN, CARL DEETJEN, MURIEL DEETJEN, RUDOLPH H. DEETJEN, JR., PAUL PORZELT, CHARLES SCHUBERT, BRIAN O'NEILL, THOMAS J. STEVENSON, JR., ALBERT EMANUELL, II,

Defendants-Appellees

REPLY BRIEF FOR APPELLANT

On Appeal from Order of the United States District Court for the Southern District of New York

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CASES CITED

ARGUMENT

DEFENDANTS HAVE NOT SHOWN IN THEIR ANSWERING BRIEF THAT THERE EXISTS ANY DISPUTE OR CONTROVERSY WHICH MUST BE SUBMITTED TO ARBITRATION

A. Allegation That There Still Exist Claims Which Arose Prior To August 31, 1970

Defendants contend that they have no requirement at this stage of the proceedings to come forward with proof to show the existence of any claims arising prior to August 31, 1970 (Appellees' brief, p. 2). Defendants have stated their position quite simply: "Merely putting at issue the allegations of the complaint is sufficient to show a dispute between the parties" (Appellees' brief, p. 2). Does the mere assertion by one of the parties that there is a dispute, no matter how improbable it is that there is any such dispute, automatically prevent this Court from determining whether there is any dispute which is required to be submitted to arbitration?

The Supreme Court has determined that the question of arbitrability is for the courts (see cases cited at p. 6 of Appellant's brief). How can a court properly determine whether an issue is to be submitted to arbitration unless one of the parties establishes some basis, in fact, for such a contention? It is incumbent upon the defendants, as the moving

party for the motion to stay these proceedings pending arbitration, to come forward with some proof that an actual dispute or controversy exists which would require removal of this case from the courts. Defendants have not, and obviously can not, establish that any such claims do, in fact, exist. Plaintiff has repeatedly requested defendants to show the existence of one such claim, and staff counsel for the Court of Appeals has made a similar request. But still, the defendants have failed to furnish any such information. Surely, after four and one-half years, defendants must know what claims now exist, which arose prior to August 31, 1970, and which are still unpaid; and if they cannot offer proof of any such claims, then there is nothing to be decided by arbitration.

Plaintiff has accepted, for the purpose of this proceeding, the figure of $38,931.28 as the amount due to him from the defendants. This amount was computed by defendants' own certified public accountant (Appellant's Appendix, p. 17a). It is respectfully submitted that for defendants to contend, at this point of the proceedings, that they do not have to come forward to show why their own accountant's determination of the amount due plaintiff is subject to a further reduction because of the alleged existence of other, unidentified claims is simply another attempt to stall the payment due plaintiff for more than four years.

Defendants, in citing the case of Necchi v. Necchi Sewing Machine Sales Corp., 348 F. 2d 693 (2 Cir., 1965), cert. denied, 383 U.S. 909, point out that the Court decided which issues were arbitrable and which were not without deciding whether there was any merit to them (Appellees' brief, p. 4). Plaintiff is not asking this Court to pass upon the merits of a particular claim arising under or out of the partnership agreement, but rather to determine whether there are any such claims. Plaintiff does not seek a legal determination, for example, that he is, or is not, responsible for the claim of a creditor who has furnished goods or services to the partnership, but rather whether any such claims are even in existence, and which would therefore require a determination by an arbitrator.

It was suggested in Appellant's brief (pp. 8-9) that if any claim does, in fact, exist, and this is shown now to the satisfaction of the Court, the Court should order that plaintiff be paid the sum of $38,931.28, plus interest, less a reserve of 3.9% (plaintiff's share of partnership capital) to cover any such claims. Defendants state that by making this point, plaintiff has conceded that there is a dispute between the parties (Appellees' brief, p. 2). Plaintiff makes no such concession. Defendants have not, after four years, come forward with any such claim, and that is the point of Appellant's brief. The language used in Appellant's brief

(at p. 8) is "assuming arguendo that...there are such claims". Certainly, this cannot be construed as a concession that there is an actual dispute or controversy between the parties.

Defendants also contend that "the court below found a dispute without asking for evidence supporting appellees' claim that there was one" (Appellees' brief, p. 4). Plaintiff agrees that this was the decision below, and that in so deciding, the Court was in error.

B. Allegation That There Are Claims Which Arose After August 31, 1970.

Defendants suggest that plaintiff is in some way responsible for a share of the expenses incurred during the liquidation of the defendant partnership (Appellees' brief, p. 6). As set forth in the complaint, plaintiff gave notice of his withdrawal in February, 1970, effective August 31, 1970, and did, in fact, terminate his limited partnership on that date. This is admitted by defendants in their answer. On August 31, 1970, the defendants were not in liquidation, and the sale of assets did not take place until after August 31, 1970. How then can plaintiff be responsible for a share of these expenses or losses? Defendants admit that as a matter of law, plaintiff might be correct, but that such determination must be submitted to arbitration, citing Prima Paint Corp. v. 388 U.S. 395 (1967). Again, plaintiff does not dispute the right of arbitrators to decide questions of law. But as stated

in Prima Paint Corp., supra, and numerous other cases, the court must be satisfied first that the issue is arbitrable. What the defendants seek to accomplish here, with respect to claims arising after August 31, 1970, is based on the same line of reasoning as proposed by them with respect to claims arising prior to August 31, 1970: Set forth a completely unsubstantiated claim, and declare that such statement, by itself, constitutes a "dispute". Defendants are certainly "clutching at any straw" by contending that plaintiff is responsible for claims which did not even come into existence until after he terminated his interest in the Partnership. The New York Partnership Law does not make a partner liable for subsequent claims, and the partnership agreement here in question specifically states that no partner shall share in any losses of the partnership incurred after the date of his withdrawal (Appellant's Appendix, p. 19a). Defendants' contention is, therefore, no more than an attempt to hold plaintiff responsible for claims after the date the partnership agreement between them had been terminated - and such a controversy, which does not arise out of the contract, is not subject to the arbitration clause of the contract (see argument, appellant's brief, pp. 10-11).

CONCLUSION

The order of the district court granting the motion to stay this action pending arbitration should be reversed and the defendants should be directed to pay to plaintiff the sum of $38,931.28 plus interest. There is no dispute or controversy to be submitted to arbitration.

Respectfully submitted,

MURRAY M. WEINSTEIN
Attorney for Appellant

SAMUEL J. WEINSTEIN
Of Counsel

January 27, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SIDNEY N. ROSENTHAL,

Plaintiff-Appellant

vs.

EMANUEL, DEETJEN & CO., et als.

Defendants-Appellees

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APPEAL NO. 2344

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Murray M. Weinstein being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 36 Far Brook Drive, Short Hills, New Jersey. On January 29, 1975, deponent served the within Reply Brief for Appellant upon Edmund Purves, Esq., attorney for Defendants-Appellees in this action, at 430 Park Avenue, New York, N.Y., the address designated by said attorney for that purpose by depositing 2 true copies of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Murray M Weinstein
MURRAY M. WEINSTEIN

Sworn to and subscribed before
me this 29th day of January, 1975.

Notary Public

LORETTA J. CORTESE
Notary Public, State of New York
No. 41-58-5382
Qualified in Queens County
Commission Expires March 30, 1976